COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544



December 10, 1988

To: Judge Joseph F. Weis, Jr., Chairman, and Members of the Committee on Rules of Practice and Procedure



From: John F. Grady, Chairman, Advisory Committee on Civil Rules

I hereby submit our Committee's draft of proposed amendments to Rules 4, 12, 15, 26, 28, 34, 35, 44, 45, 47, 48, 63, 72, and 77, and to Admiralty Rules C and E. We also propose a new rule to be numbered Rule 4.1.

Some of these proposals have previously been published for comment and revised in light of public comment. Among the amendments given public consideration in 1985 were proposals to amend Rules 4, 28, 44, 63, 72, and 77 and Admiralty Rules C and E. The proposals with respect to Rules 63 and 72 and Admiralty Rules C and E have previously been approved in substance by your Committee. Your Committee has also approved a change in chapter headings. These proposals to the rules have been withheld pending accumulation of a sufficient package of proposals to make the group worthy of study by the bench and bar. The proposals transmitted today constitute such a package.

The Committee has additional matters under consideration at this time. At its meeting in April, 1989, our Committee will consider additional revisions to Rules 5, 12, 14, 16, 23, 24, 30, 33, 38, 50, 51, 53, 50, 54, 56, 58,

77 and 84 and Rule 3 of the rules for §§2254-2255 cases. Some of these revisions have been studied at previous meetings of our Committee. A few have not been considered, but are relatively minor changes proposed by the Local Rules Project of your Committee. Our Committee proposes that the changes recommended at our April meeting be added to the package here transmitted to be considered together by the bench and bar.

If it is mutually convenient for the two committees, it is our recommendation that we strive to assemble all of our recommendations in form suitable for publication for comment not later than the end of August, 1989. This would allow the proposals to be transmitted to Congress in early 1990 with an effective date in that year.

RULE 4

This rule would be re-written. It has been amended on several occasions and is not a coherent text. Proposals for additional amendments came to the Committee from the international bar, the Local Rules Project, the Department of Justice, the National Association of Process Servers, and even from the Supreme Court. Under the circumstances, our Committee elected to make a fresh start on the rule. Several significant changes would result.

First, subdivision (e) of the revised rule would authorize service of a summons and complaint anywhere in the world. In authorizing service anywhere, the rule provides in every case an appropriate means of notification of persons against whom claims are made. The amendment will simplify federal forum-selection law by eliminating the need to conform to state long-arm legislation or other state law governing service of process. But subdivision (e) does not presume to assure jurisdiction over the person of all defendants who might be served.

Second, in providing for service anywhere in the world, the new rule calls attention to the 1969 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents. It would generally require plaintiffs to make use of internationally agreed methods of service when such methods are available. In this requirement, the new rule reconfirms the 1988 holding of the Supreme Court in *Volkswagenwerk Aktiengesellschaft v. Schlunk.* By using the procedure of requesting waiver of service, many plaintiffs may be able to save substantial costs of formal service abroad.

Third, subdivision (k) of the revised rule extends the jurisdiction of the district courts over the person of certain defendants who cannot be reached under the former rule. That subdivision conforms precisely to the present law in the provisions of its paragraph (1), but paragraph (2) is new and provides a federal long-arm long in cases arising under federal law.

Congress has on a number of occasions made specific provision for nationwide personal jurisdiction in actions brought to enforce particular federal statutes; the effect of these provisions has been to establish a federal long-arm law with respect to those statutory rights to which such provisions apply. The revision here proposed would reverse the presumption and allow for the enforcement of federal law against all persons to whom the national law applies, unless Congress otherwise provides.

This new provision is significant, but will affect fewer cases than might be supposed. It has no effect, of course, on the subject matter jurisdiction of the federal courts. Moreover, because of the restrictive effects of federal venue laws that would be unaffected by this revision, most federal question cases would still be brought and tried in the same districts as before the revision. The revision does provide territorial jurisdiction over defendants in federal question cases to which no nationwide service provision presently applies and who are not subject to the reach of the local long-arm statute. The most significant affected group will be defendants outside the country whose contacts with any one state are too spare to sustain personal jurisdiction of the courts of any state, but whose contact with the United States has been sufficient to give rise to a claim of possible violation of federal law. The need for this change was observed by the Supreme Court in its 1987 decision in *Omni Capital Intern. v. Rudolf Wolff & Co.*

Although the number of cases affected is not large, this reform is sufficiently significant in the drafting of federal legislation that our Committee recommends that this feature of the new rule be proposed on condition that Congress enact an amendment to 28 U.S.C. §1331 that approves the principle of personal jurisdiction over all defendants against whom are made claims arising under federal law. If Congress fails to enact such an amendment, the Committee recommends that its revision become law without the

pertinent paragraph (k)(2), thus leaving federal forum-selection law substantially as is.

Fourth, the new rule would enlarge the use of the less expensive methods of service introduced by the 1983 amendments to the rule. Established in 1983 was the use of "mail service," that is not really service at all, but a means of eliminating the need for formal service. This draft would be explicit in imposing on most civil defendants a duty to cooperate in saving the costs of service. For most defendants, anywhere in the world, the plaintiff could meet the requirements of Rule 4 by a simple notice to which the defendant would be asked to respond by waiving formal service. A defendant failing to return a waiver form would, unless good cause be shown, become liable for the full costs of service. By this means, the Committee hopes to reduce the waste experienced in the present practice, and perhaps even to induce a generally higher level of cooperation among counsel.

Fifth, the new rule would further reduce the need for the services of the United States Marshals. In particular, the marshals would no longer be used in actions brought by the United States.

Sixth, the new rule would reduce the burden of bringing suit against the United States. In response to requests from the Department of Justice, our Committee has not recommended that the Justice Department be subject to the same procedure of requested waiver of service to which most civil defendants would be subject. Instead, as the Department proposes, the Committee recommends the use of certified or register mail to serve the United States.

The Committee also recommends the deletion of the provision requiring service on both the United States Attorney and the Attorney General. The Department of Justice opposes this change. Nevertheless, the Committee concluded that a civil plaintiff should not be required to serve two officers of the same Department. The Committee was influenced by the knowledge that more than a few plaintiffs have been confronted with a highly technical objection by the Department to the sufficiency of service or of process, even in cases in which a statute of limitations stands in the way of correcting the plaintiff's mistake. By reducing the number of officers to be served by half, the Committee hopes not only to spare expense, but to reduce the

frequency with which civil claims against the government are defeated by technicality.

Seventh, the new rule would explicitly impose on counsel the burden of preparing the summons. Overburdened offices of clerks are no longer able to provide this service and it is in any case a task best performed by counsel for the plaintiff.

Finally, the new rule would reduce the incorporation of state law to deal with the form of the federal summons. In this respect, the revision would move a step closer to the goal of national uniformity envisioned by the Rules Enabling Act of 1934.

Rule 4.1

In reorganizing Rule 4, it proved to the Committee to be desirable to separate those provisions dealing with the service of process other than the summons. This new rule is the result of that separation and allows Rule 4 to be written to deal only with the subject of the summons.

One change would be effected by Rule 4.1. Subdivision (b) would allow nationwide service of an order committing a party for civil contempt. Present law and practice allows nationwide enforcement of decrees and injunctions by means of the criminal contempt power. The revision would provide a civil contempt alternative in dealing with party-contemnors who have removed themselves from the vicinity of the district court whose commands they defy.

Rule 12

A modification of the text of Rule 12 is occasioned by the re-writing of Rule 4. The only effect of this change will be to eliminate the reference to state law that allows defendants a longer time to answer when they can invoke state law provisions that are more generous to defendants than is this rule.

Rule 15

Revision of this rule is needed to assure the use of the relation-back principle to protect plaintiffs who erroneously name the defendants against whom they claim. The need for this revision was revealed in the 1986 decision of the Supreme Court in *Schiavone v. Fortune*.

Rule 26

Revision of this rule would establish the principle that discovery in another country should proceed according to the laws of that country, unless the results are demonstrably inadequate. The need for this revision was first occasioned by the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, and was reinforced by the 1987 decision of the Supreme Court in *In re Societe Internationale Industrielle Aerospatiale*.

Rule 28

This revision is a companion to that recommended for Rule 26. It calls attention to the Hague Convention and gives priority to internationally agreeable methods of taking depositions abroad.

Rule 34

This revision is occasioned by the amendment of Rule 45 that eliminates the need for an independent action to compel the production of documents or an inspection of premises.

Rule 35

This amendment is responsive to action taken by Congress in 1988 to allow the use of clinical psychologists in the conduct of mandatory mental examinations in civil cases. The Committee proposes to allow district courts to make use of any licensed health professionals having skills appropriate to particular cases.

Rule 44

This amendment is another that is related to a Hague Convention, this one to the Convention Abolishing the Requirement of Legalization for Foreign Public Documents. It calls attention to the simplified process available under that Convention. The amendment also eliminates the obsolete references to the Panama Canal Zone and the Ryukyu Islands.

Rule 45

Revision of this rule was requested by the American Bar Association, and that organization has already approved the substance of this draft.

The primary aim is to establish more solid protections for non-party witnesses who are sometimes the victim of misuse by adversary parties and who are often not represented by counsel. These protections are already available under existing law, but the new subdivision (c) assembles them in one place. That subdivision and subdivision (d) will be printed on the back of the subpoena.

A second purpose of the revision is to provide for a subpoena of documents that can be used independently of a deposition subpoena, and also a subpoena for the inspection of premises.

A third purpose is to enable counsel to issue subpoenas in the name of any federal court without necessity for submitting the form to a distant clerk of court for the affixing of a seal.

A fourth purpose is to clarify in subdivision (d) the obligations of a non-party witness responding to a subpoena for the production of documents.

Rule 47

This amendment is responsive to the 1973 decision of the Supreme Court in *Colgrove v. Battin.* In deciding that the district court has discretion in fixing the size of the jury, the Court eliminated the need for the institution of alternate jurors, whose position derived from the need to have a jury of exact predetermined size.

The revised rule also makes it clear that the court may excuse a juror during the period of deliberations without causing a mistrial.

Rule 48

This amendment is a companion to the amendment of Rule 47. It is explicit that a jury may be as small as six and that at least that number must unanimously support a verdict unless the parties otherwise stipulate.

Rule 63

This amendment has been previously reviewed by your Committee and a final paragraph was added to the Note at your suggestion. The purpose of the amendment is to enable

a successor judge to complete an ongoing trial whatever the cause of the inability of the first judge to continue.

CHAPTER HEADINGS

The proposal to revise the chapter heading for Chapter VIII and to introduce a new heading as Chapter IX was previously approved by your Committee and is included in this report for information.

RULE 72

This proposal was considered by your Committee in 1987 and remanded to us for reconsideration in light of a possible change in Rule 6. The Committee Note has since been revised to delete the reference to the short-period counting system. The amendment is needed to clarify a discrepancy in the 1983 amendment.

RULE 77

This proposal authorizes the district court to reopen the period for appeal if convinced that the appellant never received notice of entry of a judgment. Complaints about failure to receive notice have become too common, and the sanction for failure to keep a close watch on the clerk's office is too severe. A prevailing party who is concerned about delayed finality is encouraged to serve notice of the judgment under Rule 5; if that is done, then the power of the court to reopen the period for appeal is precluded. This rule overlaps F. R. App. P. 4(a), and for that reason has been submitted to the Appellate Rules Committee for comment.

ADMIRALTY RULE C

The aim of this amendment is to reduce the burden on the office of the United States Marshals Service. In substantially similar form, this proposal was published for comment in 1985. It was suggested that the marshal be made to continue responsibility for the cargo of a seized vessel. This change has been made, and your Committee approved it in 1987. It is included in this report for information.

ADMIRALTY RULE E

This amendment is a companion to the amendment to Admiralty Rule C and has also been approved by your Committee.

**CONTENTS**

# RULE 4 PROCESS SUMMONS



(a) ~~SUMMONS: ISSUANCE. Upon the filing of the complaint, the clerk shall forthwith issue a summons and deliver the summons to the plaintiff or the plaintiff's attorney, who shall be responsible for prompt service of the summons and a copy of the complaint. Upon request of the plaintiff separate or additional summons shall issue against any defendants.~~

~~(b)~~ SAME: FORM. The summons shall be signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend and shall notify the defendant that in case of the defendant's failure to do so judgment by default will be rendered against the defendant for the relief demanded in the complaint. ~~When, under Rule 4(e), service is made pursuant to a statute or rule of court of a state, the summons, or notice, or order in lieu of summons shall correspond as nearly as may be to that required by the statute or rule.~~ ***The court may allow a summons to be amended.***

***(b) ISSUANCE. Upon the filing of the complaint, the plaintiff may present a summons in proper form to the clerk for signature and seal. The clerk shall sign and seal the summons and issue it to the plaintiff for service on the defendant. An additional summons or a copy of the summons shall be issued for each party to be served.***

(c) SERVICE ***WITH COMPLAINT; BY WHOM MADE.***

(1) ~~Process, other than a subpoena or a summons and complaint, shall be served by a United States marshal or deputy United States marshal, or by a person specially appointed for that purpose~~ ***The summons and complaint shall be served together. The plaintiff shall be responsible for service of a summons and complaint within the time allowed under subdivision (m) of this rule and shall furnish the person effecting service with such copies of the summons and complaint as are necessary.***

(2) ~~(A)~~ ~~A summons and complaint shall, except as provided in subparagraphs (B) and (C),~~ be served ***Service may be effected*** by any person who is not a party and is not less than 18 years of age, ***provided that the court may at the request of the plaintiff direct that service be effected by a person or officer***

***(who may be a United States marshal or deputy United States marshal) specially appointed by the court for that purpose. A special appointment shall be made when the plaintiff is***

~~(B)--A-summons-and-complaint-shall,-at-the-request of-the party-seeking-service or such party's attorney, be-served-by a-United States marshal--or-deputy-United States-marshal,--or by-a-person-specially-appointed-by the-court-for-that purpose,-only~~

~~(i)---on-behalf--of--a--party~~ authorized to proceed in forma pauperis pursuant to Title 28, U.S.C. § 1915, or ~~of~~ a seaman authorized to proceed under Title 28, U.S.C. §1916~~,~~.

~~(ii)---on-behalf--of--the-United-States--or-an officer-or agency-of-the-United-States,-or~~

~~(iii)---pursuant--to--an--order--issued--by--the court stating--that--a--United--States--marshal--or deputy--United States--marshal,---or---a---person specially-appointed-for-that purpose,-is-required to-serve-the-summons-and-complaint in-order--that service--be--properly--effected--in--that particular action.~~

(C)--A summons and complaint may be served upon a defendant of any class referred to in paragraph (1) or (3) of subdivision (d) of this rule

(i)--pursuant to the law of the State in which the district court is held for the service of summons or other like process upon such defendant in an action brought in the courts of general jurisdiction of that State, or

(ii)--by mailing a copy of the summons and of the complaint (by first class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to form 18-A and a return envelope, postage prepaid, addressed to the sender. If no acknowledgment of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint shall be made under subparagraph (A) or (B) of this paragraph in the manner prescribed by subdivision (d)(1) or (d)(3).

(D)--Unless good cause is shown for not doing so the court shall order the payment of the costs of personal service by the person served if such person

~~does not complete and return within 20 days after mailing, the notice and acknowledgment of receipt of summons.~~

~~(E) The notice and acknowledgment of receipt of summons and complaint shall be executed under oath or affirmation.~~

~~(3) The court shall freely make special appointments to serve summonses and complaints under paragraph (2)(B) of this subdivision of this rule and all other process under paragraph (1) of this subdivision of this rule.~~

~~(D) SUMMONS AND COMPLAINT; PERSON TO BE SERVED. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:~~ ***WAIVER OF SERVICE; DUTY TO SAVE COSTS OF SERVICE; REQUEST TO WAIVE.***

***(1) A defendant who waives service of a summons does not thereby waive any objection to the venue or to the jurisdiction of the court over the person of the defendant.***

*(2) A defendant who receives notice of an action in the manner provided in this paragraph has a duty to avoid unnecessary costs of service of a summons. To avoid costs, the plaintiff may notify the defendant of the commencement of the action and request that the defendant waive service of a summons. With respect to an individual other than an infant or incompetent person or with respect to a domestic or foreign corporation or a partnership or other unincorporated association that is subject to suit under a common name, if such notice and request*

*(A) is in writing and addressed to the defendant, or to an individual who could be served pursuant to subdivision (g) of this rule as representative of an entity that is the defendant;*

*(B) is dispatched through first-class mail or other equally reliable means;*

*(C) contains a copy of the complaint and identifies the court in which it has been filed;*

*(D) informs the defendant of the consequences of compliance and of a failure to comply with the request;*

*(E) allows the defendant a reasonable time to return the waiver, which shall be at least 20 days from the date on which the request is sent, or 60 days if the defendant is addressed outside any judicial district of the United States; and*

*(F) provides the defendant with an extra copy of the notice and request and a prepaid means of compliance in writing;*

*and the defendant fails to comply with the request, the court shall impose the costs of effecting service on the defendant unless good cause for the failure be shown.*

*(3) A defendant timely returning a waiver so requested shall not be required to serve an answer to the complaint until 30 days after the date designated in the request of waiver of service for its return.*

*(4) When a waiver of service is filed with the court, the action shall proceed as if a summons and complaint had been served at the time of filing of the waiver and no proof of service shall be required.*

*(5) The costs to be imposed on a defendant under paragraph (2) for failure to comply with a request for a waiver of service of a summons shall include the costs of service under subdivision (e) or (g) of this*

***rule and the costs, including a reasonable attorney's fee, of any motion required to collect such costs of service.***

(~~i~~ ***e) PERSONAL SERVICE UPON INDIVIDUALS. Unless otherwise provided by federal law, personal service*** ~~U~~upon an individual ***from whom a waiver has not been obtained and filed,*** other than an infant or an incompetent person, ***shall be effected as follows:***

***(1)*** by delivering a copy of the summons and of the complaint to the individual personally ***within any judicial district of the United States;*** or

***(2)*** by leaving copies thereof at the individual's dwelling house or usual place of abode ***within any judicial district of the United States*** with some person of suitable age and discretion then residing therein; or

***(3)*** by delivering ***within any judicial district of the United States*** a copy of the summons and of the complaint

***(A)*** to an agent authorized by appointment or by law to receive service of process~~;~~ ***; or***

***(B) to the office or place of business of the individual to the extent permitted by the law of the state in which the service is effected for***

*service in that state in an action brought in any of its courts of general jurisdiction; or*

*(4) in a foreign country, by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents, provided, however, that, if service is not effected within six months from the date on which the assistance of the government of the foreign country was requested pursuant to the applicable treaty or convention, service may be effected as directed by the court; or*

*(5) in a foreign country, if internationally agreed means of service are unavailable, provided that service is reasonably calculated to give notice:*

*(A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or*

*(B) as directed by the foreign authority in response to a letter rogatory or letter of request; or*

*(C) unless prohibited by the law of the foreign country, by*

***(i) delivery to the individual personally of copies of the summons and of the complaint; or***

***(ii) any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or***

***(iii) diplomatic or consular officers when authorized by the United States Department of State; or***

***(D) if there is no lawful means by which service can be effected in the foreign country, by such means as the court shall direct.***

***Service may be effected within any judicial district of the United States under paragraphs (1), (2), or (3) of this subdivision even though the defendant is a citizen or resident of, or found within, another country and could therefore be served under paragraphs (4) or (5) of this subdivision.***

(2 ***f) SERVICE UPON INFANTS AND INCOMPETENT PERSONS. Service*** ~~U~~upon an infant or an incompetent person ***within any judicial district of the United States,*** ~~-by-serving-the summons-and--complaint~~ ***shall be effected*** in the manner prescribed by the law of the state in which the service

is made *effected* for the service ~~of--summons--or--like process--upon--any--such--defendant~~ *in that state* in an action brought in the *any of its* courts of general jurisdiction ~~of--that--state~~. *An infant or an incompetent person in a foreign country shall be served in the manner prescribed for other individuals by paragraph (e)(4) or subparagraph (e)(5)(A) of this rule.*

(~~3~~ *g) SERVICE UPON CORPORATIONS AND ASSOCIATIONS. Unless otherwise provided by federal law, service* ~~U~~upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, *and from whom a waiver of service has not been obtained and filed, shall be effected within a judicial district of the United States* by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant. *A corporation, partnership, or association may be served in a foreign country in the manner*

***prescribed for individuals by paragraphs (e)(4) and (5) of this rule.***

(4 ***h)*** ***SERVICE UPON THE UNITED STATES.*** ***Service*** ~~U~~upon the United States~~,~~ ***shall be effected*** by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court ***or by sending a copy of the summons and of the complaint by registered or certified mail addressed to the civil process clerk at the office of the United States attorney*** and ~~by sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency.~~

(5 ***i)*** ***SERVICE UPON OFFICERS, AGENCIES, OR CORPORATIONS OF THE UNITED STATES.*** ***Service*** ~~U~~upon an officer, ~~or~~ agency, ***or corporation*** of the United States~~,~~ ***shall be effected*** by serving the United States ***in the manner prescribed by***

***subdivision (h) of this rule*** and by sending a copy of the summons and of the complaint by registered or certified mail to such officer, or agency, ***or corporation.*** ~~If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule.~~

(6 *j*) ***SERVICE UPON FOREIGN, STATE OR LOCAL GOVERNMENTS.*** ***Service upon a foreign state or political subdivision thereof shall be effected pursuant to 28 U.S.C. §1608.*** ***Service*** ~~U~~upon a state or municipal corporation or other governmental organization thereof subject to suit, ***shall be effected*** by delivering a copy of the summons and of the complaint to the chief executive officer thereof or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons upon any such defendant.

~~(e) SUMMONS: SERVICE UPON PARTY NOT INHABITANT OR FOUND WITHIN STATE. Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there~~

~~is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.~~

(~~f~~ *k*) TERRITORIAL LIMITS OF EFFECTIVE SERVICE. ~~All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state. In addition, persons who are brought in as parties pursuant to Rule 14, or as additional parties to a pending action or a counterclaim or cross-claim therein pursuant to Rule 19, may be served in the manner stated in paragraphs (1) (6) of subdivision (d) of this rule at all places~~

~~outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced, or to which it is assigned or transferred for trial; and persons required to respond to an order of commitment for civil contempt may be served at same places. A subpoena may be served within the territorial limits provided in Rule 45.~~ *(1) service of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a defendant who*

*(A) could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is held,*

*(B) is a party joined under Rule 14 or Rule 19 and served at a place within a judicial district of the United States and not more than 100 miles from the place from which the summons issues,*

*(C) is subject to the federal interpleader jurisdiction.*

*(2) Unless a statute of the United States otherwise provides, or the Constitution in a specific application otherwise requires, service of a summons or filing of a waiver of service is also effective to establish jurisdiction over the person of any defendant*

***in order to determine a claim arising under federal law.#***

(g *l*) RETURN ***PROOF OF SERVICE.*** ***If service is not waived,*** ~~T~~the person ~~serving--the--process~~ ***effecting service*** shall make proof ~~of--service~~ thereof to the court ~~promptly-and-in-any-event-within-the-time-during which-the-person-served-must-respond-to-the-process.~~ If service is made by a person other than a United States marshal or deputy United States marshal, such person shall make affidavit thereof. ***If service is made outside any judicial district of the United***

# The Advisory Committee on the Civil Rules recommends the promulgation of paragraph (2) subject to affirmative approval by Congress in the form of an amendment to 28 U.S.C. §1331 adding language as follows, or other words to similar effect: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States ***and over the persons of defendants in such actions.***"

Given the significance of the matter to the work of Congress, it would be inappropriate for the rulemaking process to effect such a change without the active approval of Congress. In making this recommendation, the Committee acknowledges the presence of an issue regarding the competence of the rulemaking process to effect such a change. See Whitten, *Separation of Powers Restrictions on Judicial Rulemaking: A Case Study of Federal Rule 4*, 40 MAINE L. REV. 41 (1988).

If Congress fails to revise §1331 as suggested, the revision of the rule should nevertheless be effected, but without paragraph (2). In that form, the new rule would leave to the courts the formulation of principles of amenability to personal jurisdiction without reference to the strictures contained in the former subdivision (e). No immediate change in practice would be intended.

***States, proof may be made as prescribed by any applicable treaty or convention, or if service is made pursuant to paragraph (e)(5), proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.*** ~~If--service--is--made--under--subdivision (e)(2)(C)(ii)-of-this-rule,-return-shall-be-made-by-the sender's--filing--with--the--court--the--acknowledgment received-pursuant--to--such--subdivision--.~~ Failure to make proof of service does not affect the validity of the service.

~~(h)--AMENDMENT.---At-any-time-in-its-discretion-and upon-such--terms-as-it-deems-just,-the-court-may-allow any-process-or-proof-of-service-thereof-to-be-amended, unless-it-clearly-appears-that-material-prejudice-would result-to-the-substantial-rights-of--the-party--against whom-the-process-issued.~~

~~(i) ALTERNATIVE-PROVISIONS-FOR-SERVICE-IN-A-FOREIGN-COUNTRY.~~

~~(1)---Manner.----When--the--federal--or--state--law referred-to-in-subdivision-(e)-of-this-rule-authorizes service--upon-a--party--not--an-inhabitant--of--or--found within-the-state-in-which-the-district-court-is-held, and--service--is--to--be--effected--upon-the--party--in--a foreign-country,--it-is-also-sufficient-if--service--of

~~the summons and complaint is made: (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or (B) as directed by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual notice; or (C) upon an individual, by delivery to him personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent; or (D) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or (E) as directed by order of the court. Service under (C) or (E) above may be made by any person who is not a party and is not less than 18 years of age or who is designated by order of the district court or by the foreign court. On request, the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service.~~

~~(2) Return. Proof of service may be made as prescribed by subdivision (g) of this rule, or by the law of the foreign country, or by order of the court. When service is made pursuant to subparagraph (1)(D) of~~

~~this--subdivision,--proof--of--service--shall--include--a receipt--signed--by--the--addressee--or--other--evidence--of delivery-to-the-addressee-satisfactory-to-the-court.~~

(~~j~~ *m*) SUMMONS: TIME LIMIT FOR SERVICE. If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the ~~party--on--whose--behalf--such--service--was--required~~ ***plaintiff*** cannot show good cause why such service was not made within that period, the ***court may*** ~~action--shall be--dismissed--as--to--that--defendant--without--prejudice~~ upon ~~the--court's~~ ***its*** own initiative after notice to ~~such--party--or--upon--motion~~ ***the plaintiff dismiss the action as to that defendant or direct that service be effected within a specified time.*** This subdivision shall not apply ~~to--service--in--a--foreign--country pursuant--to--subdivision--(i)--of--this--rule~~ ***if the defendant is not an inhabitant of and cannot be found in any judicial district of the United States.***

***(n) SERVICE OR SUMMONS NOT FEASIBLE. If a statute of the United States so provides or upon a showing that the plaintiff cannot with reasonable efforts serve the defendant with a summons in any manner authorized by this rule, the court may assert jurisdiction over any assets of the defendant found within the district by***

***seizing the assets under the circumstances and in the manner provided by the law of the state in which the district court sits.***



## ADVISORY COMMITTEE NOTES

PURPOSES OF REVISION. There are eight purposes to this revision. One aim of the revision is to reorganize a frequently amended rule in a more useful and readable form.

A second purpose of the revision is to extend and clarify the cost-saving practice of securing the assent of the defendant to dispense with actual service of the summons and complaint. The revision changes the nomenclature and makes the modified device of requested waiver of service of a summons available in almost all cases.

Third, the revision seeks to harmonize federal practice among the district courts by eliminating unnecessary incorporation of state law. The revision would thereby move a step closer to the goal of national uniformity set by the Rules Enabling Act of 1934.

Fourth, in part by reducing the dependence of the federal practice on varied state law, the revision aims to reduce the number and difficulty of issues arising from the service of a summons. Subdivision (e) provides a means of service for all defendants wherever they may be.

Fifth, the revision extends the reach of the federal courts to exercise personal jurisdiction over defendants against whom are made claims arising under federal law, without regard for the limits of the local state long-arm law. This revision is proposed subject to the approval of Congress.

Sixth, the revision aims to call attention to the important effect of the Hague Convention and other treaties bearing on service of documents abroad, to favor the use of internationally agreed means of service, and to disfavor methods of service that are in violation of foreign law.

Fifth, the revision aims to call attention to the important effect of the Hague Convention and other treaties bearing on service of documents abroad, to favor the use of internationally agreed means of service, and to disfavor methods of service that are in violation of foreign law.

Sixth, the revision proposes further to reduce the use of United States marshals in the performance of routine duties of service.

Seventh, the revision aims to reduce the burden of commencing an action against the United States.

RULE RESTRICTED TO SERVICE OF SUMMONS. The present Rule 4 is entitled "Service of Process" and applies to the service not only of summons, but also other process as well, although these are not specified by the present rule. The service of process in eminent domain proceedings is governed by Rule 71A. The service of a subpoena is governed by Rule 45, and service of papers such as orders, motions, notices, pleadings, and other documents is governed by Rule 5.

The revised rule is entitled "Summons" and applies only to that form of legal process. Those few provisions of the present rule which bear specifically on the service of process other than a summons are relocated in Rule 4.1.

SUBDIVISION (a). The revised subdivision (a) contains most of the language of the former subdivision (b). The second sentence of the former subdivision (b) has been stricken, so that the federal court summons will be in all cases the same. Few states now employ distinctive requirements of form for a summons and the applicability of such requirements in federal court can only serve as a trap for an unwary party or attorney.

A sentence is added to this subdivision authorizing an amendment of a summons. This sentence replaces the rarely used former subdivision 4(h). *See* 4A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE §1131 (2d ed. 1987).

SUBDIVISION (b). The revised subdivision (b) replaces the former subdivision (a). The revised text makes clear that the responsibility for filling in the summons falls on the plaintiff, not the clerk of court. If there are multiple defendants, the plaintiff may secure issuance of a summons for each defendant, or may serve copies of a single original so long as the addressee of the subpoena is effectively identified.

SUBDIVISION (c). Paragraph (1) of the revised subdivision retains language from the former subdivision (d)(1). Paragraph (2) retains language from the former subdivision (a), and adds an appropriate caution regarding the time limit on service now set forth in subdivision (m).

The 1983 revision of Rule 4 relieved the marshals' offices of much of the burden of serving summons. Subdivision (c) now extends that reduced dependence on the marshal's office in actions in which the party seeking service is the United States. The United States, like other civil litigants, would be permitted to designate any person who is 18 years of age and not a party to serve its summons.

The court remains obligated to provide through special appointment of a marshal, a deputy, or some other person, for the service of a summons in two classes of cases specified by statute, actions brought *in forma pauperis* or by a seaman. 28 U.S.C. §§ 1915, 1916. The court also retains discretion to provide for official service on motion of a party. Where a law enforcement presence appears to be necessary or advisable to keep the peace, the court should appoint a marshal or deputy or other official person to make the service.

SUBDIVISION (d). This provision is new, but is partially derived from the former subparagraph (c)(2)(C) and (D). The aims of the provision are to eliminate the costs of service of a summons on many parties and to foster cooperation among adversaries and counsel. Paragraph (2) of the subdivision states what the present rule implies, that there is a duty to avoid costs associated with the service of a summons not needed to inform the defendant regarding the commencement of an action.

A defendant may be requested to waive service of a summons wherever or however that defendant might be served if service were required, unless the defendant is an infant or an incompetent, or a government entity. Defendants in

these groups may in some cases be less able to make a competent waiver, and are therefore not subject to the duty to save costs. With respect to service on the United States, costs are saved in other ways, by operation of subdivision (h).

The former rule was held to limit the acknowledgment procedure to cases in which the defendant could have been served within the forum state. CASAD, JURISDICTION IN CIVIL CASES (1986 Supp.), S5-13 and cases cited. But see *United States v. Union Indemnity Ins. Co.*, 4 F.R.Serv. 3d 578 (E.D.N.Y. 1986). As Professor Casad observed, there was no reason not to use this form of service outside the state, and there are many instances in which it has in fact been so used.

Paragraph (1) of this subdivision is explicit that a timely waiver of service of a summons and complaint does not prejudice the right of a defendant to object by means of a motion authorized by Rule 12(b)(2) to the absence of jurisdiction over the defendant's person, or to assert any other defense that may be available. All that is eliminated are issues of the sufficiency of the summons and the sufficiency of the method by which it is served.

A defendant failing to comply with a request for waiver shall be given an opportunity to show good cause for the failure, but sufficient cause should be rare. It is not a good cause for failure to waive service that the claim is unjust or that the court lacks jurisdiction. It would, however, be sufficient cause not to shift the cost of service if the defendant did not receive the request or was insufficiently literate in English to understand it.

Because the waiver would be consensual, the transmission of a request to a foreign country should give no offense even to foreign governments that have withheld their assent to service by mail. See Heidenberg, *Service of Process and Gathering Information Relative to a Lawsuit Brought in West Germany, 9 INT'L* LAW 725, 78-29 (1975). Because of the unreliability of some foreign mail services, the longer period of 60 days is provided for a return of a notice and request for waiver sent abroad. The time limit of subdivision (m) is not applicable to such service.

Paragraph (2) sets forth the requirements for a Notice and Request for waiver sufficient to put the cost-shifting provision in place. These requirements are illustrated in Form 1A, which replaces the former Form 18A.

Subparagraph (2)(A) is explicit that a request for waiver of service by a corporate defendant must be addressed to a person qualified to receive service and cannot be effectively transmitted through the general mail rooms of large organizations.

Subparagraph (2)(B) permits the use of alternatives to the United States mails in sending the Notice and Request. While private messenger services or electronic communications are not likely to be as inexpensive as the mail, they may be equally reliable and on occasion more convenient to the plaintiff. Especially with respect to transmissions abroad, alternative means may be desirable.

Paragraph (3) extends the time for answer to assure that a defendant will not gain any delay by failing to waive service of the summons. Absent this extension, the defendant would be rewarded with additional time for answer under Rule 12(a) if the waiver is not returned, or if its return is postponed as long as the Notice and Request allows.

Paragraph (4) clarifies the effective date of service when service is waived; the provision is needed to resolve an issue arising when applicable law requires service of process to toll the statute of limitations. E.g., *Morse v. Elmira Country Club*, 752 F.2d 35 (2d Cir. 1984). Cf. *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980).

The device of requested waiver of service is not suitable to circumstances in which the statute of limitations is about to run; unless there is ample time, the plaintiff should proceed directly to the formal methods of service identified in the other provisions of subdivision (d).

Requested waiver should also be avoided when the time for service under subdivision (m) will expire before the date on which the waiver must be returned. While a plaintiff has been allowed additional time for service in that situation, *e.g., Prather v. Raymond Constr. Co.*, 570 F. Supp. 278 (N.D.Ga., 1983), the court might properly refuse a request for additional time.

Paragraph (5) of the subdivision is explicit that the costs of enforcing the cost-shifting provision are themselves recoverable from a defendant who fails to return the waiver. In the absence of such a provision, the purpose of the rule would be frustrated by the cost of its enforcement, which is likely to be high in relation to the benefit secured by the plaintiff.

SUBDIVISION (e). This subdivision displaced the former paragraphs (d)(1) and (i)(1). It provides means for the service of summons on individuals anywhere. Service of the summons under this subdivision does not conclusively establish the jurisdiction of the court over the person of the defendant. A defendant may invoke the territorial limits of the court's reach set forth in subdivision (k).

Paragraphs (1) and (2) authorize personal service of a summons in any judicial district of the United States. The former subdivision (e) bearing on proceedings against parties not found within the state is stricken. Likewise stricken is the first sentence of the former subdivision (f) restricting the authority of the federal process server to the state in which the district court sits. The effect is to provide for personal service of a federal summons in any judicial district of the United States. It is no longer necessary to proceed in the manner provided by state law.

This revision reduces the unnecessary complexity of federal forum-selection law. In incorporating as it does so much of the law of the state, the former rule not only created disuniformity, but also superimposed a redundant level of forum-selection restraints on those otherwise provided by the federal constitution and federal legislation. The elimination of this added level of restraint appears to have been first advocated in Barrett. *Venue and Service of Process in the Federal Courts - Suggestions for Reform*, 7 VAND.L.REV. 608 (1954). Compare D. Currie, *The Federal Courts and the American Law Institute (Part 2)*, 36 U.CHI.L.REV. 268, 299-311 (1969); see also Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411, 432-41 (1981).

Thus, a secondary effect of this provision for service of a federal summons in any judicial district is to facilitate the creation of a federal long-arm law applicable to actions brought to enforce the national law. Such a provision is set forth in paragraph (2) of subdivision (k)

of this rule and is also proposed for enactment by Congress. The consequences of this revision will be more fully explained in the Notes to that subdivision.

Subparagraph (3)(A) continues the former law with respect to agents. An agency by law may be created by state law. *See* 4A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE §1098 (2d ed. 1987).

Subparagraph (3)(B) is new; it explicitly authorizes service of a federal summons at an office or place of business where authorized by state law. This practice was formerly employed in many districts pursuant to state law as authorized under the former subdivision (e). Given the increasing difficulty of abode service at high-rise condominiums, the practice of office service seems likely to increase in frequency. Because the practice entails issues of privacy, the revision would retain a reference to state law to as a limit on the intrusiveness of federal process.

Paragraphs (4) and (5) provide for service on individuals who are abroad, replacing the former subdivision (i) that was added to Rule 4 in 1963. Reflecting the pattern of Rule 4 in incorporating state-law limitations on the exercise of jurisdiction over persons, the former subdivision (i) limited service outside the United States to cases in which such extraterritorial service was authorized by state or federal law. The new rule eliminates the requirement of explicit authorization. On occasion, service abroad was held to be improper for lack of such statutory authority. E.g. *Martens v. Winder*, 341 F.2d 197 (9th Cir.), *cert. denied* 382 U.S. 937 (1965). Such authority was, however, found to exist by implication. E.g., *SEC v. VTR, Inc.*, 39 F.R.D. 19 (S.D.N.Y. 1966). Given the substantial increase in the number of international transactions and events that are the subject of litigation in federal courts, it is appropriate to infer a general legislative authority to effect service on defendants abroad.

Paragraph (4) gives effect to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents, which entered into force for the United States on February 10, 1969. *See* 28 U.S.C.A., F. R. Civ. P. 4 (1986 Supp.). One purpose of these amendments is to call attention to the Convention and to its importance in dealing with problems of service abroad. *See generally* RISTAU 1 INTERNATIONAL JUDICIAL ASSISTANCE 118-176 (1984). The use of the Convention is mandatory when available. See *Volkswagenwerk*

it is appropriate to infer a general legislative authority to effect service on defendants abroad.

Paragraph (4) gives effect to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents, which entered into force for the United States on February 10, 1969. *See* 28 U.S.C.A., F. R. Civ. P. 4 (1986 Supp.). One purpose of these amendments is to call attention to the Convention and to its importance in dealing with problems of service abroad. *See generally* RISTAU 1 INTERNATIONAL JUDICIAL ASSISTANCE 118-176 (1984). The use of the Convention is mandatory when available. See *Volkswagenwerk Aktiengesellschaft v. Schlunk,* 100 L.Ed.722 (1988). Therefore, paragraph (4) of this subdivision provides that the methods of service appropriate under the Convention or other international agreements shall be employed if available.

The Hague Convention does not provide a time within which a Central Authority must effect service, but Article 15 does provide that alternate methods may be used if a Central Authority does not respond within six months. Generally, a Central Authority can be expected to respond much more quickly than that limit might permit, but there have been occasions when the signatory state was dilatory. The proviso to paragraph (4) therefore authorizes the court to direct an alternative service if the Central Authority has not effected service within six months.

Paragraph (5) provides alternative methods for use when internationally agreed methods are unavailable. Service by methods that are violations of foreign law are not generally authorized. Subparagraphs (A) and (B) prescribe the more appropriate methods of conforming to local practice or using a local authority.

Subparagraph (C) prescribes other methods authorized by the former rule, and a new one set forth in clause (iii). This clause allows American consular and diplomatic officers to serve process abroad. There is a statutory provision for this in the Foreign Sovereign Immunities Act, 28 U.S.C. § 1608(a)(4). Also see 22 C.F.R. § 92.5 (1981) (State Department authority for such service).

Subparagraph (D) provides for the exceptional situation in which there is no lawful means for giving a person abroad notice of an action against that person. In such cases, the court shall direct the method of service. Inasmuch as our

Constitution requires that reasonable notice be given, an earnest effort should be made to devise a method of communication. In an appropriate circumstance, a court may authorize a nominal violation of foreign law in order to effect service in an action brought by an American national to enforce rights under American law. A court may also specially authorize use of ordinary mail. Cf *Levin v. Ruby Trading Corporation*, 248 F. Sup.. 537 (S.D.N.Y. 1965). *And see* 4A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE §1098 (2d ed. 1987).

Several minor changes in the text reflect the Hague Convention. First, the term "letter of request" has been added. Although these words are synonymous with "letter rogatory," "letter of request" is preferred in modern usage. The provision should not be interpreted to authorize use of a letter of request when there is in fact no treaty obligation on the receiving country to honor such a request from this country or when the United States does not extend diplomatic recognition to the foreign nation.

Second, the passage formerly found in subparagraph (i)(1)(B), "when service in either case is reasonably calculated to give actual notice," has been relocated in paragraphs (4) and (5). The requirement of reasonable notice is rooted in the due process clause of the Fifth Amendment and applies to all the available methods. Article 15 of the Hague Service Convention itself furnishes safeguards against the abridgment of rights of parties through inadequate notice by providing for verification of actual notice or a demonstration that process was served by a method prescribed by the internal laws of the foreign state before a default judgment may be entered. Article 16 of the Convention also enables the judge to extend the time for appeal after judgment if the defendant shows either a lack of adequate notice to defend or to appeal the judgment, or has disclosed a prima facie case on the merits.

SUBDIVISION (f). This provision retains the text of the former paragraph (d)(2), with changes reflecting those made in the previous subdivision. Thus, provision is made for serving infants and incompetent persons abroad.

SUBDIVISION (g). This provision retains the text of the present paragraph (d)(3), with changes reflecting those made in subdivision (e).

SUBDIVISION (h). This subdivision amends former paragraph (d)(4) to permit the United States attorney to be served by registered or certified mail. The rule does not authorize the use of the notice and request procedure of subdivision (d) when the United States is the defendant for the reason that the large bulk of mail received by the United States daily makes internal misdirection of mail a risk and timely return of waivers problematic. For the same reason, the subdivision requires that mail service be specifically addressed to the civil process clerk of the office of the United States Attorney.

The subdivision eliminates the present requirements for service on multiple federal officers. Responsibility for internal communications within the Department of Justice rests with the office of the United States Attorney. who is subject to the direction of the Attorney General of the United States. The present requirement of multiple service antedates the availability to the United States of the duplicating machine and the computer, inventions that facilitate internal communications and obviate the need for multiple service. The risk to the United States of a failure of notice is minimal, given the provision of Rule 55(e) regarding defaults against it. The risk to plaintiffs of defects in service resulting from the former requirement of multiple service proved to be more than minimal.

SUBDIVISION (i). This subdivision replaces the former paragraph (d)(5), with changes conforming to those made in subdivision (h).

SUBDIVISION (j). This subdivision retains the text of the former paragraph (d)(6) without material change.

It also adds a reference to the statute governing service of a summons on a foreign state or political subdivision, the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §1608. The caption of the subdivision reflects that change.

SUBDIVISION (k). This subdivision replaces the former subdivision (f), with no change in the title. The first paragraph retains the substance of the former rule in explicitly authorizing the exercise of personal jurisdiction over persons who could be reached under state long-arm law, the "100-mile bulge" provision added in 1963, or the federal interpleader act.

Paragraph (2) is an important addition authorizing the exercise of territorial jurisdiction over the person of any defendant when needed to enforce the national law. The addition is a companion to the amendment of subdivision (e) that provides for service of a summons and complaint anywhere in the world. As noted in the Advisory Committee Note to that subdivision, such extraterritorial service provides appropriate notice of the proceeding but is not operative to establish jurisdiction over the persons served. This subdivision measures the effectiveness of the service to establish jurisdiction over persons, and this paragraph (2) operates as a federal long-arm provision for claims arising under federal law. It extends the federal reach in cases arising under federal law to the full extent allowed by the Fifth Amendment and any applicable Congressional enactment.

As noted in the Advisory Committee Note to subdivision (e), these provisions reduce the complexity of federal forum-selection law. In addition, this subdivision corrects a hiatus in the enforcement of federal law. Under the former rule, a problem was presented when the defendant was a non-resident of the United States having contacts with the United States sufficient to justify the application of United States law and to satisfy federal standards of forum selection, but having insufficient contact with any single state, or at least with the state in which the district court sat, to support jurisdiction under state long-arm legislation or meet the requirements of the Fourteenth Amendment limitation on state court territorial jurisdiction. In such cases, the defendant was shielded from the enforcement of federal law by the fortuity of a favorable limitation on the power of state courts which was incorporated into the federal practice by the former rule. In this respect, the revision responds to the suggestion of the Supreme Court made in *Omni Capital Intern. v. Rudolf Wolff & Co., Ltd.*, 108 S.Ct. 404, 411 (1987.)

In some matters, Congress had previously addressed the problem by providing for nationwide service of process and full exercise of territorial jurisdiction by all district courts. See CASAD, JURISDICTION IN CIVIL ACTIONS, chap. 5 (1983). The rule now opens to federal plaintiffs new choices of forums, but fewer than may appear, for there remain ample provisions of federal law to constrain choices that might be abusive of the rights and interests of defendants. These are both constitutional and statutory.

Constitutional limitation arises from the Fifth Amendment rather than from the Fourteenth Amendment, which limits state-court reach and which is presently incorporated into federal practice by the reference to state law in the text of the present Rule 4(e). The Fifth Amendment requires that any defendant have affiliating contacts with the United States sufficient to justify the exercise of personal jurisdiction over that party. *Cf. Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 418 (9th Cir. 1977). There may also be a further Fifth Amendment constraint in that a plaintiff's forum selection might be so inconvenient to a defendant that it would be a denial of the "fair play and substantial justice" required by the due process clause, even though the defendant had significant affiliating contacts with the United States. See *DeJames v. Magnificent Carriers*, 654 F.2d. 280, 286 n.3 (3d Cir. 1981). Compare *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293-294 (1980); *Insurance Corp of Ireland v. Compagnie des Bauxites des Guinee*, 456 U.S. 692, 702-703 (1982); *Asahi Metal Indus v. Superior Court*, 107 S. CT. 1026, 1033-1035 (1987). See generally Lusardi, *Nationwide Service of Process: Due Process Limitations on the Power of the Sovereign*, 33 VILL. L. REV. 1 (1988).

Statutory limitation on the federal plaintiff's choice of forum derives from specific venue provisions and from the general venue provisions of Title 28. With respect to claims against individuals which arise under federal law, the general venue provision is so restrictive that the restraints resulting from the requirement that the territorial jurisdiction of the federal court be conformed to that of the local state court can have little if any incremental effect. Such actions must be brought in the district in which the claim arose or in the district in which the defendant resides. 28 U.S.C. § 1391(b). No issue of constitutional dimension can arise from an exercise of territorial jurisdiction by a federal court sitting in either such district.

If the defendant is a corporation, § 1391(c) authorizes suit in the district in which it is incorporated, or in which it does business. A claim arising in one place could imaginably be brought in a federal forum distant from that place because of the corporation's unrelated business activity there. In such a situation, the present requirement of conformity with state territorial limits may confine the choice of forum to a greater extent than does the federal venue statute.

Conformity to state law was most consequential with respect to aliens who get less protection from the federal venue law; an alien may be sued in any district under § 1391(d). There are some special federal venue provisions which authorize actions to proceed in the district in which the plaintiff resides.

But in all of these situations in which liberal venue provisions apply, Congress has also provided for transfers for convenience and fairness under § 1404. The availability of this provision precludes any conflict between the full exercise of territorial jurisdiction permitted by this rule and the Fifth Amendment requirement of "fair play and substantial justice." Those cases in which the plaintiff maintains a choice of forum that would not have been open to that plaintiff if the federal court were required to conform its territorial jurisdiction to that of state courts would be few, and would be limited to those in which the court regarded the plaintiff's choice as not unfair.

The extension of the federal reach is inapplicable to cases in which federal jurisdiction rests on the diversity of citizenship of the parties. This is perhaps a necessary application of the principle of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Cf. *Arrowsmith v. United Press International*, 320 F.2d 219 (2d Cir. 1963).

This subdivision does not alter the subject matter jurisdiction of the district courts. The doctrine of pendent jurisdiction may, of course, be invoked to permit actions joining claims arising under federal law with interlocking claims arising under state law. *Hurn v. Oursler*, 289 U.S. 238 (1933); *United Mine Workers v. Gibbs*, 387 U.S. 715 (1966). The function of that principle is to enable federal law plaintiffs to employ a federal forum without suffering the inconvenience or possible disadvantage that may result if related state law claims are pursued separately. That principle has been applied to state law claims interlocking with federal claims in which nationwide service of process has been employed. *See* 4A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE §1125 (2d ed. 1987) (cases collected in note 8).

Caution should, however, be exercised in the employment of the doctrine to bring into a federal court a state-law or foreign-law claim that could not be otherwise presented either to a federal court or to a state court in the district in which the federal court sits. There is a

problem of fairness in the exercise of such "double-pendent" jurisdiction. The unfairness that can result in "double-pendent" jurisdiction lies in the unforeseeably episodic nature of federal court involvement in relationships largely governed by the law of a distant state. Unless the interlocking relationship between the state and federal claims is strong, there may even be a consideration of constitutional due process applicable to constrain "double-pendent" jurisdiction over the person of a defendant. Cf. *Helicopteros Nacionales de Colombia S.A. v. Hall*, 466 U.S. 408 (1984). When it is necessary or desirable to join a federal-law claim with a state-law claim that could not be maintained in a local state court, consideration should be given to a transfer of the action to a federal court in a state in which the state-law action might have been brought.

There will, on the other hand, be cases in which application of the doctrine of pendent jurisdiction is clearly appropriate. An example might be a case brought in a federal court to assert a claim arising under federal law that gives rise to counterclaims bringing into play issues linked to the plaintiff's state law claims not otherwise subject to pendent jurisdiction. In such circumstances, it would be unjust to foreclose joinder of the state law claim, and this rule should not be read to preclude the exercise of pendent jurisdiction. But even in such a case, transfer to a district in which all claims could have been brought independently should be considered. There is, in any case, no "general, all-encompassing ... rule" with respect to these matters. *Aldinger v. Howard*, 427 U.S. 1, 13 (1976).

The danger of opening the federal courts to a large volume of new business by operation of the doctrine of pendent jurisdiction is small. For reasons stated above, the number of cases affected by the federal long-arm provision is not large. Also, the state-law claim will be dismissed if the federal-law claim proves insubstantial, so that there is no advantage to the plaintiff in contriving a colorable federal claim merely to secure the benefit of a longer federal reach to assert a state-law claim. *See* 4A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE §1125 (2d ed. 1987).

SUBDIVISION (l). This subdivision assembles in one place all the provisions of the present rule bearing on proof of service. No material change in the rule is effected. Proof of service can be amended by leave of court, although no language expressly authorizing such amendments was retained

from the former subdivision (h). *See* 4A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE §1132 (2d ed. 1987).

SUBDIVISION (m). This subdivision retains much of the language of the present subdivision (j). The last sentence is revised to reflect the changes in subdivision (d) to facilitate the service of a summons and complaint abroad.

The new subdivision explicitly provides discretion so that the court may relieve a plaintiff of the consequences of an application of this subdivision. Such relief was formerly available in some cases, partly in reliance on Rule 6(b).

Relief may be justified, for example, in a case in which the applicable statute of limitations would bar the refiled action and the defendant was evading service or concealing a defect in attempted service. *E.g., Ditkof v. Owens-Illinois, Inc.*, 114 F. R. D. 104 (E.D.Mich. 1987).

SUBDIVISION (n). This subdivision retains for possible use the instrument of quasi-in-rem jurisdiction, but limits its use to necessitous circumstances. It permits use of provisional remedies as a means to secure jurisdiction over the property of a defendant whose person is not within reach of the court, but occasions for the use of this provision should be rare. Until 1963, it was not possible under Rule 4 to assert jurisdiction in a federal court over the property of a defendant not personally served. The 1963 amendment to subdivision (e) authorized the use of state law procedures authorizing such seizures of assets as a basis for jurisdiction. Given the liberal availability of long-arm jurisdiction, the exercise of power quasi-in-rem has become an anachronism. Circumstances too spare to affiliate the defendant to the forum state sufficiently to support long-arm jurisdiction over the defendant's person are also inadequate to support seizure of the defendant's assets fortuitously found within the state. *Shaffer v. Heitner*, 433 U.S. 186 (1977).

The qualifying introductory clause of this subdivision saves the rule from superseding 28 U.S.C. §1655 or any similar provisions bearing on liens.

## *FORM 1A. NOTICE OF LAWSUIT, REQUEST FOR WAIVER OF SERVICE OF SUMMONS, AND WAIVER*

*NOTICE OF LAWSUIT*

*AND*

*REQUEST FOR WAIVER OF SERVICE OF SUMMONS*

*To: ----------, on behalf of ----------.* [Fill in the name of the person who would be served by a summons if service were necessary, and the name of any entity on whose behalf that person may be notified of the action.]

*A lawsuit has been commenced against you* [or the entity on whose behalf you are addressed]. *A copy of the complaint is attached to this notice. It has been filed in the United States District Court for the ---- ----------. It has been assigned docket number ----------.*

*A summons has been issued by that court. If served on you, it would require that you* [or the entity on whose behalf you are addressed] *answer the complaint within 20 days after service. If you* [or the entity on whose behalf you are addressed] *failed to answer in time, judgment would be entered for the relief demanded in the complaint.*

*The purpose of this Notice is to save the cost of service of the summons. Rule 4(d) of the Federal Rules of Civil Procedure imposes on you a duty to assist in avoiding that cost. If you fail without good cause to do so, the court will order you to bear the cost of service.*

*The cost of service will be avoided if you return to me before* ---------- [20 days after the date of on which this Notice and Request is sent, or 60 days if addressee is not in any judicial district of the United States] *a signed copy of this form. I hereby request that you sign below, and I enclose a stamped and addressed envelope [or other means of cost-free return] for your use. An extra copy of this form is also attached.*

*If you timely return this form, you will retain any defense or objections you may have except any that might relate to the summons or to the service of the summons and complaint. You will retain any rights you may have to object to the jurisdiction of the court or the place where the action has been brought. It is not good cause for your failure to return this form that you believe that the complaint is unfounded or that the action has been brought in an improper place or in a*

*court that lacks jurisdiction over the subject matter of the action or over your person or property.*

*If you comply with this request and return this form, it will be filed with the court and no summons will be served on you* [or the person on whose behalf you are addressed]. *YOU* [OR THE PARTY ON WHOSE BEHALF YOU ARE ADDRESSED] *WILL THEN BE REQUIRED TO ANSWER THE ENCLOSED COMPLAINT BEFORE* ----------[50 days from the date on which this Notice and Request is sent, or 90 days if the addressee is not in any judicial district of the United States.] *Your answer should be served on me and a copy should be filed with the court. If you fail to answer by that date, a judgment by default will be taken against you for the relief demanded in the complaint.*

*I affirm that this request is being sent to you on behalf of the claimant this ------- day of -----,19--.*

*Signature of Plaintiff's Attorney*

*WAIVER OF SERVICE OF SUMMONS*

*I acknowledge receipt of this Notice and Request and the attached copy of a complaint. I agree to save the cost of service of a summons and an additional copy of the complaint in this lawsuit and I do not require that service on me be completed in the formal manner provided by Rule 4.*

*I retain any defenses or objections I* [or the entity on whose behalf I am addressed] *may have to the lawsuit or the jurisdiction of the court.*

*I understand that a judgment may be entered against me if I do not answer the complaint on or before* ---------- [50 days from date on which this request is sent, or 90 days if defendant is addressed outside any judicial district of the United States] *unless granted additional time by order of court.*

*Signature of Addressee*

*Date:*----------

*Relationship to Defendant, if responding on behalf of an entity:*----------

## RULE 4.1 SERVICE OF OTHER PROCESS

*(a) GENERALLY. Process other than a summons as provided in Rule 4 or subpoena as provided in Rule 45, shall be served by a United States marshal or a deputy United States marshal, or by a person specially appointed for that purpose. Such process may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States, beyond the territorial limits of that state.*

*(b) ENFORCEMENT OF ORDERS: COMMITMENT FOR CIVIL CONTEMPT. An order of commitment of a party, or an order to a party to show cause why the party should not be held in contempt, or committed for civil contempt, of a decree or injunction issued to enforce the laws of the United States may be served in any district. Such orders with respect to other decrees or injunctions shall be served in the state in which is located the court issuing the order to be enforced or elsewhere within the United States if not more than 100 miles from the place at which the order to be enforced was issued.*

## ADVISORY COMMITTEE NOTE

This is a new rule. Its purpose is to separate those few provisions of the former Rule 4 bearing on matters other than service of a summons to allow greater textual clarity in Rule 4. Subdivision (a) contains no new language.

Subdivision (b) replaces the final clause of the penultimate sentence of the former subdivision 4(f), a clause added to the rule in 1963. The new rule provides nationwide service of orders enforcing decrees or injunctions issued to compel compliance with federal law. The rule makes no change in the practice with respect to the enforcement of injunctions or decrees not involving the enforcement of federally-created rights.

The extension of the reach of the civil contempt power applies only to orders addressed to parties. A party once served with a summons is subject to service under Rule 5 of a decree or injunction that may be enforced by an exercise of the contempt power. Thus, for example, an injunction may be served on a party through that person's attorney. *Chagras v. United States*, 369 F. 2d 643 (5th cir. 1966). The same is true for service of an order to show cause why a party should not be held in contempt. *Waffenschneider v. Mackay*, 763 F. 2d 711 (5th cir. 1985). The rule is new, therefore, only with respect to orders of commitment.

Nationwide enforcement of federal decrees and injunctions is already available throught the criminal contempt power. A federal court may effect the arrest of a criminal contemnor anywhere in the United States. 28 U.S.C. §3041. And a contemnor when arrested may be subject to removal to the district in which punishment may be imposed. F. R. Crim. Pro. 40. Thus, the present law permits criminal contempt enforcement against a contemnor wherever that person may be found.

The effect of the new rule is therefore only to provide a choice of civil or criminal contempt sanctions in those situations to which it applies. Contempt proceedings, whether civil or criminal, must be brought in the court that was allegedly defied by a contumaceous act. *Ex parte Bradley*, 74 U.S. 366 (1869). This is so even if the offensive conduct or inaction occurred outside the district of the court in which the enforcement proceeding must be conducted. *E.g., McCartney v. United States* , 291 Fed. 497 (8th cir.), *cert. denied* 263 U.S. 714 (1923).

## RULE 12. DEFENSES AND OBJECTIONS - WHEN AND HOW PRESENTED - BY PLEADING OR MOTION - MOTION FOR JUDGMENT ON THE PLEADINGS.



(a) WHEN PRESENTED.

*(1) Unless a different time is prescribed in a statute of the United States,* A *a* defendant shall serve an answer

(A) within 20 days after the service of the summons and complaint upon that defendant, *or*

***(B) if service of the summons has been waived on request made pursuant to Rule 4(d), within 50 days from the date on which the request of waiver was sent, or 90 days if the defendant was addressed outside any judicial district of the United States*** ~~except--when service is made under Rule 4(e) and a different time is prescribed in the order of court under the a statute of the United States or in the statute or rule of court of the state.~~

*(2)* A party served with a pleading stating a cross-claim against that party shall serve an answer thereto within 20 days after the service upon that party. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service

of the answer, or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The United States or an officer or agency thereof shall serve an answer to the complaint or to a cross-claim, or a reply to a counterclaim, within 60 days after the service upon the United States attorney of the pleading in which the claim is asserted.

***(3)*** The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court~~:~~, ***if the court***

(~~1~~ ***A***) ~~if the court~~ denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action;

(~~2~~ ***B***) ~~if the court~~ grants a motion for a more definite statement the responsive pleading shall be served within 10 days after the service of the more definite statement.

* * * * * *

## ADVISORY COMMITTEE NOTE

Subdivision (a) is amended to strike the reference to state law with respect to the time for answer. This amendment accords with the amendment to Rule 4 in providing nationwide uniformity with respect to the form and content of a summons: 20 days is the time for answer wherever the district court may sit.

Subdivision (a) is also revised to reflect amendments to Rule 4. A defendant who waives service of process on request made pursuant to Rule 4(d) is protected against any resulting abbreviation of the time for answer. Pursuant to Rule 4(d)(3), the defendant is allowed 50 days from the date of dispatch of the notice and request, or 90 days if the defendant is addressed outside any judicial district of the United States.

The former provision of Rule 4 to which reference was made has been deleted.

## RULE 15. AMENDED AND SUPPLEMENTAL PLEADINGS



* * * * *

(c) RELATION BACK OF AMENDMENTS. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing ***or renaming*** the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by ~~law~~ ***Rule 4(m)*** for ~~commencing the action against~~ ***service of the summons and complaint,*** the party to be brought in by amendment~~, that party~~ (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (2) knew or should have known that, but for a mistake concerning the ***name or*** identity of the proper party, the action would have been brought against the party.

The delivery or mailing of process to the United States Attorney, or United States Attorney's designee, or the Attorney General of the United States, or an

agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

* * * * *



## ADVISORY COMMITTEE NOTE

The rule has been revised to prevent parties against whom claims are made from taking unjust advantage of otherwise inconsequential pleading errors to sustain a limitations defense. An intended defendant who is effectively notified of an action within 120 days after commencement by filing, the period allowed by Rule 4(m) for service of a summons and complaint, may not under the proposed rule defeat the action on account of a defect in the pleading such as a misnomer. If the notice requirement is met within that period, a complaint may be amended at any time to correct a formal defect such as a misnomer or misidentification. The need for this revision was revealed in *Schiavone v. Fortune*, 106 S. Ct. 2379 (1986), where the Court reached a result based on the text of the present rule that is inconsistent with the liberal pleading practices secured by Rule 8. See Brussack, *Outrageous Fortune The Case for Amending Rule 15(c) Again*, 61 S. CAL. L. REV. 671 (1988); Lewis, *The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision*, 86 MICH. L. REV. 1507 (1987).

Unaffected by this revision is the basic principle of *Walker v. Armco*, 446 U.S. 740 (1980) that state law is the source of limitations law applicable to diversity litigation in the federal courts. All that the revision precludes is the assertion of errors of form in the pleadings to defeat an otherwise timely assertion of a claim.

The revised rule does not preclude the application of a more forgiving principle of limitations law that would, for example, allow relation-back in circumstances not covered by

the rule, which aims only to protect the pleader from adversity resulting from narrow, strict or literal interpretation of a complaint to render it vulnerable to a limitations defense. *E.g., Marshall v. Mulrenin*, 508 F. 2d 39 (1st cir. 1974).

## RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY



(a) DISCOVERY METHODS. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. ***If an applicable treaty or convention provides for discovery in another country, the discovery methods agreed to in such treaty or convention shall be employed; but if such methods afford discovery that is inadequate and additional discovery is not prohibited by the treaty or convention, a party may employ the methods here provided in addition to those provided by such convention or treaty.***

* * * * *

### ADVISORY COMMITTEE NOTE

The revised rule reflects the policy of accommodation to internationally agreed methods of discovery expressed in the concurring opinion in *In re Societe Nationale Industrielle Aerospatiale*, 482 U.S. 2542, 2557-2568 (1987). Attorneys and judges should be cognizant of the adverse consequence for international relations of unduly intrusive discovery methods that offend the sensibilities of those

governing other countries. *See generally* Weis, *The Federal Rules and the Hague Conventions: Concerns of Conformity and Comity*, --- U. PITT. L. REV. ---- (1989). If certain methods of discovery have been approved for international use, positive international relations require that these methods be preferred, and that other methods should be employed only if the approved methods are inadequate to meet the need of the litigant for timely access to the information.

On the other hand, international litigants should not be placed in a favored position as compared to American litigants similarly situated, especially in commercial matters with respect to which the similar American litigants may be their economic competitors. For this reason, full discovery should be available equally against all who litigate in the federal courts.

## RULE 28. PERSONS BEFORE WHOM DEPOSITIONS MAY BE TAKEN.



* * * *

(b) IN FOREIGN COUNTRIES. ***Subject to the provisions of Rule 26(a)*** ~~In a foreign country~~, depositions may be taken ***in a foreign country*** (1) ***pursuant to any applicable treaty or convention, or (2) pursuant to a letter rogatory or a letter of request, or (3)*** on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (~~2~~ ***4***) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony~~, or (3) pursuant to a letter rogatory~~. A commission or a letter rogatory ***or a letter of request*** shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory ***or a letter of request*** that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory ***or a letter of request*** may be issued in proper cases. A notice or commission may designate the person

before whom the deposition is to be taken either by name or by descriptive title. A letter rogatory may be addressed "To the appropriate Authority in [here name the country]." ***When a letter of request or any other device is used pursuant to any applicable treaty or convention it shall be captioned in the form prescribed by that treaty or convention.*** Evidence obtained in response to a letter rogatory ***or a letter of request*** need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.



## ADVISORY COMMITTEE NOTE

This revision is intended to make effective use of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, and of any similar treaties which the United States may enter into in the future, as sources of additional methods for taking depositions abroad. Pursuant to revised Rule 26(a), the party taking the deposition is obliged to conform to an applicable treaty or convention if an effective deposition can be taken by such internationally approved means.

The term "letter of request" has been added to the rule wherever appropriate in the expectation that the procedure will gain widespread acceptance because it is the primary method provided by the Hague Convention. There are several other minor changes that are designed merely to carry out the intent of the other alterations.

## RULE 34. PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES.



* * * *

(c) PERSONS NOT PARTIES. ~~This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land~~ ***A person not a party to the action may be compelled to produce documents and things or to submit to an inspection as provided in Rule 45.***

* * * * *

### ADVISORY COMMITTEE NOTE

This amendment reflects the change effected by revision of Rule 45 to provide for subpoenas to compel non-parties to produce documents and things and to submit to inspections of premises.

## RULE 35. PHYSICAL AND MENTAL EXAMINATIONS OF PERSONS



(a) ORDER FOR EXAMINATION. When the mental or physical condition (including the blood group) of a party or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical ~~examination by a physician~~, or mental examination by a ~~physician or psychologist~~ ***an examiner licensed by the law of the place at which the examination is ordered to diagnose the condition in controversy***, or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) REPORT OF EXAMINING ~~PHYSICIAN OR PSYCHOLOGIST~~ ***LICENSED EXAMINER***.

(1) If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the requesting party a copy of the detailed

written report of the ~~examining---physician---or psychologist~~ ***licensed examiner*** setting out the ~~physician's--or---psychologist's~~ ***examiner's*** findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that the party is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a ~~physician--or psychologist~~ ***licensed examiner*** fails or refuses to make a report the court may exclude the testimony of the ~~physician-or-psychologist~~ ***licensed examiner*** if offered at trial.

(2) * * * *

(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an ~~examining~~

physician ***licensed examiner*** or the taking of a deposition of the physician ***licensed examiner*** in accordance with the provisions of any other rule.

~~(c) DEFINITIONS. For the purpose of this rule, a psychologist is a psychologist licensed or certified by a State or the District of Columbia.~~



## ADVISORY COMMITTEE NOTE

The revision extends the amendment of the rule adopted by Congress by Act of October 21, 1988. The rule now allows the district court to order a physical or mental examination by a health professional other than a "physician" or a "psychologist." The rule requires that the examination be conducted by a person licensed by the law of the place at which the examination is conducted to diagnose the condition in controversy, including licensed physicians and psychologists. In all states, there are provisions licensing persons other than medical doctors to provide various diagnostic services. A party wishing to employ the services of a licensed examiner other than a medical doctor would be permitted to do so with the consent of the court. In some cases, financial saving to parties may accrue. The court would retain discretion to refuse to order an examination, or to restrict an examination, by an examiner whose license to diagnose a physical or mental condition is restricted, or to select an examiner different from the person nominated by the moving party. 8 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE §2234 (1986 Supp.).

## RULE 44. PROOF OF OFFICIAL RECORD



(a) AUTHENTICATION.

(1) DOMESTIC. An official record kept within the United States, or any state, district, *or* commonwealth, ~~territory, or insular possession thereof,~~ or within ~~the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands~~ ***a territory subject to the administrative or judicial jurisdiction of the United States,*** or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by the officer's deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political sub-division in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of the officer's office.

(2) FOREIGN. A foreign official record, or an entry therein, when admissible for any purpose, may be

evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certification may be made by a secretary of embassy or legation, consul general, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification. ***The final certification is unnecessary if both the United States and the foreign country in which the official record is located are parties to a treaty or convention that abolishes or displaces that***

***requirement, in which event the record and the attestation shall be certified as provided in the treaty or convention.***

* * * * *



## ADVISORY COMMITTEE NOTES

PARAGRAPH (a)(1). The amendment strikes the references to specific territories, two of which are no longer subject to the jurisdiction of the United States, and adds a generic term to describe governments having a relationship with the United States such that their official records should be treated as domestic records.

PARAGRAPH (a)(2). This amendment adds a sentence to dispense with the final certification by diplomatic officers when the United States and the foreign country where the record is located are parties to a treaty or convention that abolishes or displaces the requirement. In that event the treaty or convention is to be followed. This changes the former procedure for authenticating foreign official records only with respect to records from countries that are parties to the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents. Moreover, it does not affect the former practice of attesting the records, but only changes the method of certifying the attestation.

The Hague Public Documents Convention provides that the requirement of a final certification is abolished and replaced with a model *apostille*, which is to be issued by officials of the country where the records are located. See Hague Public Documents Convention, Arts. 2-4. The *apostille* certifies the signature, official position, and seal of the attesting officer. The authority who issues the *apostille* must maintain a register or card index showing the serial number of the *apostille* and other relevant information recorded on it. A foreign court can then check the serial number and information on the *apostille* with the issuing authority in order to guard against the use of fraudulent *apostilles*. This system provides a reliable method for maintaining the integrity of the authentication process, and

the *apostille* can be accorded greater weight than the normal authentication procedure because foreign officials are more likely to know the precise capacity under their law of the attesting officer than would an American official. See generally Comment, *The United States and the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents*, 11 HARV. INT'L L.J. 476, 482, 488 (1970).

## RULE 45. SUBPOENA



(a) ~~FOR ATTENDANCE OF WITNESSES;~~ FORM; ISSUANCE.

*(1)* Every subpoena shall be issued ~~by the clerk~~ under the seal of the court, shall state the name of the court and the title of the action and command each person to whom it is directed to attend and give testimony *or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to inspect premises,* at the time and place therein specified, *and shall set forth the text of subdivisions (c) and (d) of this rule.*

*(2) A subpoena commanding attendance at a trial or hearing shall be issued by the court for the district in which the hearing or trial is to be held. A subpoena for attendance at a deposition shall be issued by the court for the district designated by the notice of deposition as the district in which the deposition is to be taken. A command to produce evidence or to permit inspection may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately. If separate, a subpoena for production or inspection shall be issued by the*

***court for the district in which the command is to be performed.***

***(3)*** The clerk shall issue a subpoena, ~~or--a subpoena--for--the-production--of-documentary--evidence,~~ signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service. ***An attorney as officer of the court may also issue a subpoena in the name of***

***(A) a court in which the attorney is authorized to practice; or***

***(B) a court for a district in which a deposition or production is compelled by the subpoena, if the deposition or production pertains to an action pending in a court in which the attorney is authorized to practice.***

(b) ~~FOR-PRODUCTION-OF-DOCUMENTARY-EVIDENCE.--A-subpoena-may also--command--the--person--to--whom--it--is-directed--to produce--the--books,--papers,-documents,---or--tangible things-designated-therein;--but-the-court,--upon-motion made-promptly-and-in-any-event-at-or-before-the-time specified-in-the-subpoena-for-compliance-therewith,-may (1)-quash-or-modify-the-subpoena-if-it-is-unreasonable or--oppressive--or--(2)--condition--denial o:--the--motion upon-the-advancement-by-the-person-in-whose-behalf-the~~

~~subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.~~

~~(c)~~ SERVICE.

*(1)* A subpoena may be served by ~~the marshal, a deputy marshal, or by~~ any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered. ***A copy of each subpoena requiring the production of documents and things before trial shall be served on each party in the manner prescribed by Rule 5(b).***

~~(d) SUBPOENA FOR TAKING DEPOSITIONS; PLACE OF EXAMINATION.~~

~~(1) Proof of service of a notice to take a deposition as provided in Rules 30(b) and 31(a) constitutes a sufficient authorization for the issuance by the clerk of the district court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein. Proof of service may be made by filing with the clerk of the district court for the district in which the deposition~~

~~is to be taken a copy of the notice together with a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by Rule 26(b), but in that event the subpoena will be subject to the provisions of Rule 26(c) and subdivision (b) of this rule.~~

~~The person to whom the subpoena is directed may, within 10 days after the service thereof or on or before the time specified in the subpoena for compliance if such time is less than 10 days after service, serve upon the attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena may, if objection has been made, move upon notice to~~

~~the deponent for an order at any time before or during the taking of the deposition.~~

~~(2) A person to whom a subpoena for the taking of a deposition is directed may be required to attend at any place within 100 miles from the place where that person resides, is employed or transacts business in person, or is served, or at such other convenient place as is fixed by an order of court.~~

~~(c) SUBPOENA FOR A HEARING OR TRIAL.~~

~~(1) At the request of any party subpoenas for attendance at a hearing or trial shall be issued by the clerk of the district court for the district in which the hearing or trial is held.~~

***(2) Subject to the provisions of subparagraph (c)(3)(B) of this rule,*** ~~A~~ ***a*** subpoena ~~requiring the attendance of a witness at a hearing or trial~~ may be served at any place within the district ***of the court in whose name it is issued***, or at any place without the district that is within 100 miles of the place of the deposition, hearing, ~~or~~ trial, ***production, or inspection*** specified in the subpoena or at any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place ~~where the~~

~~district--court--is--held~~ *of the deposition, hearing, trial, production or inspection specified in the subpoena.* When a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place. A subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in Title 28, U.S.C. § 1783.

*(3) Proof of service when necessary shall be made by filing with the clerk of the court in whose name the subpoena is issued a statement of the date and manner of service and of the names of the persons served and of the parties notified, certified by the person who made the service.*

*(c) PROTECTION OF PERSONS WHO ARE NOT PARTIES.*

*(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a non-party subject to that subpoena. The court in whose name the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction which*

*may include, but is not limited to, lost earnings and a reasonable attorney's fee.*

*(2) A non-party commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things or inspection of premises may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court in whose name the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the non-party commanded to produce, move for an order at any time to compel the production.*

*(3)(A) On timely request, the court in whose name a subpoena was issued shall quash the subpoena*

*(i) if it fails to allow sufficient time for compliance;*

*(ii) if it requires a non-party to travel to a place more than 100 miles from the place where*

*that non-party resides, is employed or transacts business in person, in order to attend a hearing, trial or deposition or to produce evidence, except that a non-party may in order to attend trial be commanded to travel from any place within the district in which the trial is held or within the state from which the non-party would be commanded to come to attend trial in a state court of general jurisdiction sitting in the place where the district court is held , or*

*(iii) to the extent that the subpoena requires disclosure of privileged matter, or*

*(iv) if it otherwise subjects the non-party to oppression.*

*(B) If a subpoena*

*(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or*

*(ii) requires disclosure of an expert opinion or information not describing specific events or occurrences in dispute and resulting from the person's study made not at the request of any party, or*

*(iii) requires a non-party to incur substantial expense to produce designated materials,*

*the court may quash the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the non-party to whom the subpoena is addressed will be reasonably compensated for the burden imposed, the court may order production only upon specified conditions.*

*(d) RESPONSE TO SUBPOENA TO PRODUCE DOCUMENTS. A non-party responding to a subpoena to produce documents shall*

*(1) produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request, and*

*(2) advise the party serving the subpoena if any material is withheld under claim of privilege.*

(~~f~~ *e*) CONTEMPT. Failure by any person without adequate cause to obey a subpoena served upon that person may be deemed a contempt of the court ~~from which~~ *in whose name* the subpoena issued. *An adequate cause for failure to obey exists when a subpoena purports to require a non-party to attend or produce at a place not*

***within the limits provided by clause (ii) of subparagraph (c)(3)(A).***

## ADVISORY COMMITTEE NOTES

PURPOSES OF REVISION. The purposes of this revision are (1) to clarify and enlarge the protections afforded persons who are required to assist the court by giving information or evidence to the parties; (2) to facilitate access to information in the control of non-parties outside the deposition procedure; (3) to facilitate service of subpoenas for depositions or productions of evidence at places distant from the district in which an action is proceeding; and (4) to clarify the organization of the text of the rule.

SUBDIVISION (a). This subdivision is be amended in five respects.

One change authorizes the issuance of a subpoena to compel a non-party to produce evidence independent of any deposition. This revision spares the necessity of a deposition of the custodian of the evidentiary material.

Second, the text is made clear that the party subject to the subpoena is required to produce materials in that party's control whether or not the materials are located within the district or within the territory within which the subpoena can be served. The new text changes the result in cases such as *Cates v. LTV Aerospace Corporation*, 480 F.2d 620 (5th Cir. 1973). The non-party witness is subject to the same scope of discovery under this rule as that person would be as a party to whom a request is addressed pursuant to Rule 34.

Third, the amended text requires that the subpoena include a statement of the rights and duties of witnesses by setting forth in full the text of the new subdivisions (c) and (d).

Fourth, the revision modifies the requirement that a subpoena be issued by the clerk of court. Provision is made for the issuance of subpoenas by attorneys as officers of the court. Inasmuch as the present role of the clerk is merely to provide the appropriate form of subpoena, there is no substantive change effected by allowing the attorneys to

issue the instruments without action of the clerk. This revision assures the advantage of facilitating the issuance of subpoenas for depositions and production orders in districts other than the district in which a trial or hearing is held. The former rule resulted in some delay caused by the need to secure forms from clerks' offices some distance from the place at which the action proceeds.

In authorizing attorneys to issue subpoenas in the name of distant courts, the amended rule effectively authorizes service of a subpoena anywhere in the United States by an attorney representing any party. This change does not itself effectively enlarge the burden on the witness, because the limits on the non-party's duty to travel are maintained.

A subpoena for a deposition must still be issued in the name of the court in which the deposition or production would be compelled. Accordingly, a motion to quash such a subpoena if it overbears the limits of the subpoena power must be presented to the court for the district in which the deposition would occur. Likewise, the court in whose name the subpoena is issued is responsible for its enforcement.

Fifth, the revised rule authorizes the issuance of a subpoena to compel the inspection of premises. Prior practice required an independent proceeding to secure such relief ancillary to the federal proceeding. Practice in some states has long authorized such use of a subpoena without apparent adverse consequence.

PARAGRAPH (b)(1). This paragraph contains the text of the former subdivision (c). The reference to the United States marshal and deputy marshal is deleted because of the infrequency of the use of these officers for this purpose. Inasmuch as these officers meet the age requirement, they may still be used if available.

A provision requiring service pursuant to Rule 5 of subpoenas for production has been added to this paragraph (b)(1). Such service is not needed with respect to a deposition because of the requirement of notice imposed by Rule 30 or 31. But when production is sought independently of a deposition, other parties may need notice in order to monitor the discovery and in order to pursue access to any information that may be produced. Service under Rule 5 would provide the needed notice.

PARAGRAPH (b)(2). This paragraph retains language formerly set forth in subdivision (e) and extends its application to subpoenas for depositions or production.

PARAGRAPH (b)(3). This paragraph retains language formerly set forth in paragraph (d)(1) and extends its applications to subpoenas for trial or hearing or production.

PARAGRAPH (c)(1). This provision is new. In imposing on the parties and their attorneys a responsibility for avoiding misuse of a subpoena, the rule extends but slightly the principle stated in Rule 26(g). Abuse of a subpoena is, in any case, an actionable tort, *Board of Ed. v. Farmingdale Classroom Teach. Ass'n*, 38 N.Y.2d 397, 380 N.Y.S.2d 635, 343 N.E.2d 278 (1975), and the duty of the attorney to the non-party is embodied in Model Rule of Professional Conduct 4.4. The most significant clause is that specifying that the attorney or party misusing a subpoena is liable for earnings needlessly lost as a result of uncaring use of the power conferred by the rule.

PARAGRAPH (c)(2). This provision retains language from the former subdivision (b) and paragraph (d)(1). The 10-day period for response to a subpoena is extended to 14 days to allow more time for such objections to be made.

PARAGRAPH (c)(3). This provision explicitly authorizes the quashing of a subpoena as a means of protecting the non-party from misuse of the subpoena power. It replaces and enlarges on the present subdivision (b) and tracks the provisions of Rule 26(c). While largely repetitious, this rule is addressed to the non-party who may read it on the subpoena.

Subparagraph (c)(3)(A) identifies those circumstances in which a subpoena must be quashed. It restates the former provisions with respect to the limits of mandatory travel of non-party witnesses that are set forth in the former paragraphs (d)(2) and (e)(1).

Subparagraph (c)(3)(B) identified those circumstances in which a subpoena should be quashed unless the party serving the subpoena shows a substantial need and the court can devise an appropriate accommodation to protect the interests of the non-party witness. This provision authorizes the court to impose the costs of producing discovery materials on the party seeking them. The court is

not required to fix the costs in advance of production, although this will often be the most satisfactory accommodation to protect the party seeking discovery from excessive costs. In some instances, it may be preferable to leave uncertain costs to be determined after the materials have been produced, provided that the risk of uncertainty is fully disclosed to the discovering party. See, *e.g.*, *United States v. Columbia Broadcasting Systems, Inc.*, 666 F.2d 364 (9th Cir. 1982).

Clause (c)(3)(B)(ii) corresponds to Rule 26(c)(7).

Clause (c)(3)(B)(iii) provides appropriate protection for the intellectual property of the non-party witness. A growing problem has been the use of subpoenas to compel the giving of evidence and information by unretained experts. Experts are not exempt from the duty to give evidence, even if they cannot be compelled to prepare themselves to give effective testimony, E.g., *Carter-Wallace, Inc. v. Otte*, 474 F.2d 529 (2d Cir. 1972), but compulsion to give evidence may threaten the intellectual property of experts denied the opportunity to bargain for the value of their services. See generally Maurer, *Compelling the Expert Witness: Fairness and Utility Under the Federal Rules of Civil Procedure*, 19 GA.L.REV. 71 (1984); Note, *Discovery and Testimony of Unretained Experts*, 1987 DUKE L.J. 140. Arguably the compulsion to testify can be regarded as a "taking" of intellectual property. The rule establishes the right of such persons to withhold their expertise, at least unless the party seeking it makes the kind of showing required for a conditional denial of a motion to quash as provided in the final sentence of subparagraph (c)(3)(B); that requirement is the same as that necessary to secure work product under Rule 26(b)(3) and gives assurance of reasonable compensation. The Rule thus approves the accommodation of competing interests exemplified in *United States v. Columbia Broadcasting Systems Inc.*, 666 F.2d 364 (9th Cir. 1982). See also *Wright v. Jeep Corporation*, 547 F. Supp. 871 (E.D. Mich. 1982).

As stated in *Kaufman v. Edelstein*, 539 F.2d 811, 822 (2d Cir. 1976), the district court's discretion in these matters should be informed by "the degree to which the expert is being called because of his knowledge of facts relevant to the case rather than in order to give opinion testimony; the difference between testifying to a previously formed or expressed opinion and forming a new one; the possibility that, for other reasons, the witness is a unique

expert; the extent to which the calling party is able to show the unlikelihood that any comparable witness will willingly testify; and the degree to which the witness is able to show that he has been oppressed by having continually to testify...."

SUBDIVISION (d). This provision is new. Paragraph (1) extends to non-parties the duty imposed on parties by the last paragraph of Rule 34(b), which was added in 1980. Paragraph (2) requires the non-party to inform the party serving the subpoena if any documents are withheld under claim of privilege; such disclosure is necessary to enable the party to contest the claim of privilege in cases in which the claim is doubtful.

SUBDIVISION (e). This provision retains most of the language of the former subdivision (f).

"Adequate cause" for a failure to obey a subpoena remains undefined. In at least some circumstances, a non-party might be guilty of contempt for refusing to obey a subpoena even though the subpoena manifestly overreaches the appropriate limits of the subpoena power. *E.g., Walker v. City of Birmingham*, 388 U.S. 307 (1967). But, because the command of the subpoena is not in fact one uttered by a judicial officer, contempt should be very sparingly applied when the non-party witness has been overborne by a party or attorney. The language added to subdivision (f) is intended to assure that result where a non-party has been commanded, on the signature of an attorney, to travel greater distances than can be compelled pursuant to this rule.

# RULE 47. JURORS



* * * * *

(b) ALTERNATE JURORS. -- The court may direct that not more than six jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanelled, 2 peremptory challenges if 3 or 4 alternate jurors are to be impanelled, and 3 peremptory challenges if 5 or 6 alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate

~~juror only, and the other peremptory challenges allowed by law shall not be used against an alternate juror.~~

***PEREMPTORY CHALLENGES. The court shall allow the number of peremptory challenges provided by 28 U.S. C. §1870.***

***(c) EXCUSE. The court may for good cause excuse a juror from service during trial or deliberation.***



## ADVISORY COMMITTEE NOTES

The former provision for alternate jurors is stricken and the institution of the alternate juror abolished.

The former rule reflected the long-standing assumption that a jury would consist of exactly twelve members. It provided for additional jurors to be used as substitutes for jurors who are for any reason excused or disqualified from service after the commencement of the trial. Additional jurors were traditionally designated at the outset of the trial, and excused at the close of the evidence if they had not been promoted to full service on account of the elimination of one of the original jurors.

The use of alternate jurors has been a source of minor dissatisfaction with the jury system because of the burden it places on alternates who are required to listen to the evidence but denied the satisfaction of participating in its evaluation.

The process of selecting alternate jurors has also posed a difficulty in the exercise of peremptory challenges. The former rule provided additional challenges to be used in the selection of alternate jurors, thus enlarging on the right to peremptory challenges otherwise provided in 28 U.S.C. §1870. Subdivision (b) makes the statutory provision the standard for the number of peremptory challenges available to a party.

Subdivision (c) makes it clear that the court may in appropriate circumstances excuse a juror during the jury deliberations without causing a mistrial.

## RULE 48. ~~JURIES-OF-LESS-THAN-TWELVE--MAJORITY-VERDICT~~

### *NUMBER OF JURORS--PARTICIPATION IN VERDICT*



~~The--parties--may--stipulate--that--the--jury--shall consist--of--any--number--less--than--twelve--or--that--a verdict-or-a-finding-of-a-stated-majority-of-the-jurors shall-be-taken-as-the-verdict-or-finding-of-the-jury.~~

***Unless the parties otherwise stipulate: (1) the court shall seat a jury of not fewer than six members; (2) all jurors shall participate in the verdict unless excused from service by the court pursuant to Rule 47(c); (3) their verdict shall be unanimous; and (4) no verdict shall be taken from a jury reduced in size to fewer than six members.***

### ADVISORY COMMITTEE NOTE

The former rule was rendered obsolete by the adoption in many districts of local rules establishing six as the standard size for a civil jury.

It appears that the minimum size of a jury consistent with the Seventh Amendment is six. *Cf. Ballew v. Georgia*, 435 U.S. 223 (1978) (holding that a conviction based on a jury of less than six is a denial of due process of law). Because the institution of the alternate juror has been abolished by of Rule 47, it will ordinarily be necessary, in order to provide for sickness or disability among jurors, to seat more than six jurors. If this precaution is taken, because all jurors will participate in the verdict, an illness occurring during the deliberation period will not result in a mistrial, as it did formerly.

## RULE 63. ~~DISABILITY~~ *INABILITY* OF A JUDGE *TO PROCEED*



If ~~by reason of death, sickness or other disability, a judge before whom an action has been tried~~ *a trial or hearing has been commenced and for any reason the judge* is unable to ~~perform the duties to be performed by the court under these rules~~ *proceed*, ~~after a verdict is returned or findings of fact and conclusions of law are filed,~~ then any other judge ~~regularly sitting in or assigned to the court in which the action is tried~~ may perform ~~those duties~~; *proceed with it* but ~~if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial~~ *upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties. In a hearing or trial without a jury, the successor judge has discretion to recall any witness.*

## ADVISORY COMMITTEE NOTE

The revision substantially displaces the former rule. The former rule was limited to the disability of the judge, and made no provision for disqualification or possible other reasons for the withdrawal of the judge during proceedings.

The former rule also made no provision for the withdrawal of the judge during the trial, but was limited to disqualification after trial. Several courts concluded that the text of the former rule prohibited substitution of a new judge prior to the points described in the rule, thus requiring a new trial, whether or not a fair disposition was within reach of a substitute judge. *E.g. Whalen v. Ford Motor Credit Co.*, 684 F.2d 272 (4th Cir. 1982, en banc) *cert. denied*, 459 U.S. 910 (1982) (jury trial); *Arrow-Hart, Inc. v. Philip Carey Co.*, 552 F.2d 711 (6th Cir. 1977) (non-jury trial). *See generally* Comment, *The Case of the Dead Judge: Fed.R.Civ.P. 63: Whalen v. Ford Motor Credit Co.*, 67 MINN. L. REV. 827 (1983).

The increasing length of federal trials has made it likely that the number of trials interrupted by the disability of the judge will increase. An efficient mechanism for completing these cases without unfairness is needed to prevent unnecessary expense and delay. To avoid the injustice that may result if the substitute judge proceeds despite unfamiliarity with the action, the new Rule provides, in language similar to Federal Rule of Criminal Procedure 25(a), that the successor judge must certify familiarity with the record and determine that the case may be completed before that judge without prejudice to the parties.

The revised text authorizes the substitute judge to make a finding of fact based on evidence heard by a different judge. It would, however, risk error to determine the credibility of an witness not seen or heard; in a case requiring such a determination, the substitute judge could not properly make the certification required. The substitute judge can under the amended rule elect to hear only that portion of the evidence for which the direct contact is valuable, relying otherwise upon the record of evidence received by the predecessor judge. In this respect, the predecessor judge performs a role not unlike that of the Magistrate when that officer conducts an evidentiary hearing. The constitutionality of this practice was questioned but upheld in *United States v. Raddatz*, 447 U.S. 667 (1980).

VIII. PROVISIONAL AND FINAL REMEDIES AND ~~SPECIAL PROCEEDINGS~~

*Insert before Rule 71A:*

***IX. SPECIAL PROCEEDINGS***

## RULE 72. MAGISTRATES; PRETRIAL ORDERS



(a) NONDISPOSITIVE MATTERS. A magistrate to whom a pretrial matter not dispositive of a claim or defense of a party is referred to hear and determine shall promptly conduct such proceedings as are required and when appropriate enter into the record a written order setting forth the disposition of the matter. ***Within 10 days after being served with a copy of the magistrate's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate's order to which objection was not timely made.*** The district judge to whom the case is assigned shall consider ***such*** objections ~~made by the parties, provided they are served and filed within 10 days after entry of the order~~, and shall modify or set aside any portion of the magistrate's order found to be clearly erroneous or contrary to law.

### ADVISORY COMMITTEE NOTE

This amendment is intended to eliminate a discrepancy in measuring the 10 days for serving and filing objections to a magistrate's action under subdivisions (a) and (b) of this Rule. The rule as promulgated in 1983 required objections to the magistrate's handling of nondispositive matters to be served and filed within 10 days of entry of the order, but required objections to dispositive motions to be made within 10 days of being served with a copy of the

recommended disposition. Subdivision (a) is here amended to conform to subdivision (b) to avoid any confusion or technical defaults, particularly in connection with magistrate orders that rule on both dispositive and nondispositive matters.

The amendment is also intended to assure that objections to magistrate's orders that are not timely made shall not be considered. Compare Rule 51.

## RULE 77. DISTRICT COURTS AND CLERKS



*REPORTER'S NOTE: Revision of this rule was approved by the Advisory Committee on Civil Rules at its meeting on November 17-19, 1988, subject to the advice and consent of the Advisory Committee on Appellate Rules. The draft has been submitted this day to that Committee for comment and advice.*

* * * * *

(d) NOTICE OF ORDER OR JUDGMENTS.

***(1)*** Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of mailing. ~~Such mailing is sufficient notice for all purposes for which notice of the entry is required by these rules; but any~~ ***Subject to the exception provided in paragraph (2), the court, if it finds that a party entitled to notice of a judgment did not timely receive it from any source and that no party would be prejudiced, may within 180 days of entry of the judgment reopen the time for appeal for a period of 14 days.***

***(2)*** ***A*** party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. ***If service of a such notice is***

***effected,*** ~~back-of-notice-of-the-entry-by-the-clerk-does not-affect-the-time-to-appeal-or-relieve-or-authorize~~ the court ***may not after 30 days from the date of such service*** ~~to-relieve-a-party-for-failure-to-appeal-within the-time-allowed~~ ***provide additional time for appeal,*** except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure.

## ADVISORY COMMITTEE NOTE

The purpose of this amendment is to permit district courts to ease strict sanctions now imposed on appellants whose notices of appeal are filed late because of their failure to receive notice of entry of a judgment. See, e.g. *Tucker v. Commonwealth Land Title Ins. Co.*, 800 F.2d 1054 (11th Cir. 1986); *Ashby Enterprises, Ltd. v. Weitzman, Dym & Associates,* 780 F.2d 1043 (D.C. Cir. 1986); *In re OPM Leasing Services, Inc.*, 769 F.2d 911 (2d Cir. 1985); *Spika v. Village of Lombard, Ill.*, 763 F.2d 282 (7th Cir. 1985); *Hall v. Community Mental Health Center of Beaver County*, 772 F.2d 42 (3d Cir. 1985); *Wilson v.Atwood v. Stark*, 725 F.2d 255 (5th Cir. en banc), *cert dismissed*, 105 S.Ct. 17 (1984); *Case v. BASF Wyandotte*, 727 F.2d 1034 (Fed. Cir. 1984), *cert. denied*, 105 S.Ct. 386 (1984); *Hensley v. Chesapeake & Ohio R.R.Co.*, 651 F.2d 226 (4th Cir. 1981); *Buckeye Cellulose Corp. v. Electric Construction Co.*, 569 F.2d 1036 (8th Cir. 1978).

Failure to receive notice may have increased in frequency with the growth in the caseload in the clerks' offices. The present strict rule imposes a duty on counsel to maintain contact with the court while a case is under submission. Such contact is more difficult to maintain if counsel is outside the district, as is increasingly common, and can be a burden to the court as well as counsel.

The revised rule recognizes the importance in many cases of closing off the time for appeal, but places the primary burden on prevailing parties to assure that their

adversaries receive effective notice. The appropriate procedure for such notice is provided in Rule 5.

The revised rule lightens the responsibility but not the workload of the clerk's offices, for the duty of that office to give notice of entry of judgment must be maintained.

The district court also retains the power conferred under F. R. App. P. 4(a) to extend the time for filing a notice of appeal. That rule is the only provision applicable where the party receives notice of the judgment and fails for any reason to take timely action.

## RULE C. ACTIONS IN REM: SPECIAL PROVISIONS



* * * * *

(3) PROCESS. Upon the filing of the complaint the clerk shall forthwith issue a warrant for the arrest of the ~~vessel or other~~ property that is the subject of the action. ***If the property is a vessel or a vessel and tangible property on board the vessel,*** ~~and deliver it~~ ***the warrant shall be delivered*** to the marshal for service. ***If other property, tangible or intangible is the subject of the action, the warrant shall be delivered by the clerk to a person or organization authorized to enforce it, who may be a marshal, a person or organization contracted with by the United States, a person specially appointed by the court for that purpose, or, if the action is brought by the United States, any officer or employee of the United States.*** If the property that is the subject of the action consists in whole or in part of freight, or the proceeds of property sold, or other intangible property, the clerk shall issue a summons directing any person having control of the funds to show cause why they should not be paid into court to abide the judgment.

* * * * *

(5) ANCILLARY PROCESS. In any action in rem in which process has been served as provided by this rule, if any part of the property that is the subject of the action has not been brought within the control of the court because it has been removed or sold, or because it is intangible property in the hands of a person who has not been served with process, the court may, on motion, order any person having possession or control of such property or its proceeds to show cause why it should not be delivered into the custody of the marshal ***or other person or organization having a warrant for the arrest of the property,*** or paid into court to abide the judgment; and, after hearing, the court may enter such judgment as law and justice may require.

## ADVISORY COMMITTEE NOTE

These amendments to Admiralty Rule C are designed to conform the rule to Fed.R.Civ.P. 4, as amended. As with recent amendments to Rule 4, it is intended to relieve the Marshals Service of the burden of using its limited personnel and facilities for execution of process in routine circumstances. Doing so may involve a contractual arrangement with a person or organization retained by the government to perform these services, or the use of other government officers and employees, or the special appointment by the court of persons available to perform suitably.

The seizure of a vessel, with or without cargo, remains a task assigned to the Marshal. Successful arrest of a vessel frequently requires the enforcement presence of an armed government official and the cooperation of the United States Coast Guard and other governmental authorities. If the marshal is called upon to seize the vessel, it is expected that the same officer will also be responsible for the seizure of any property on board the vessel at the time of seizure that is to be the object of arrest or attachment.

## RULE E. ACTIONS IN REM AND QUASI IN REM: GENERAL PROVISIONS



* * * * *

(4) EXECUTION OF PROCESS; MARSHAL'S RETURN; CUSTODY OF PROPERTY; PROCEDURES FOR RELEASE.

(a) IN GENERAL. Upon issuance and delivery of the process, or, in the case of summons with process of attachment and garnishment, when it appears that the defendant cannot be found within the district, the marshal ***or other person or organization having a warrant*** shall forthwith execute the process in accordance with this subdivision (4), making due and prompt return.

(b) TANGIBLE PROPERTY. If tangible property is to be attached or arrested, the marshal ***or other person or organization having the warrant*** shall take it into the marshal's possession for safe custody. If the character or situation of the property is such that the taking of actual possession is impracticable, the marshal ***or other person executing the process*** shall ~~execute the process by~~ affixing a copy thereof to the property in a conspicuous place and ~~by~~ leaving a copy of the complaint and process with the person having

possession or the person's agent. In furtherance of the marshal's custody of any vessel the marshal is authorized to make a written request to the collector of customs not to grant clearance to such vessel until notified by the marshal or deputy marshal or by the clerk that the vessel has been released in accordance with these rules.

(c) INTANGIBLE PROPERTY. If intangible property is to be attached or arrested the marshal ***or other person or organization having the warrant*** shall execute the process by leaving with the garnishee or other obligor a copy of the complaint and process requiring the garnishee or other obligor to answer as provided in Rules B(3)(a) and C(6); or the marshal may accept for payment into the registry of the court the amount owed to the extent of the amount claimed by the plaintiff with interest and costs, in which event the garnishee or other obligor shall not be required to answer unless alias process shall be served.

(d) DIRECTIONS WITH RESPECT TO PROPERTY IN CUSTODY. The marshal ***or other person or organization having the warrant*** may at any time apply to the court for directions with respect to property that has been attached or arrested, and shall give notice of such

application to any or all of the parties as the court may direct.

* * * * *

(5) RELEASE OF PROPERTY.



* * * * *

(c) RELEASE BY CONSENT OR STIPULATION; ORDER OF COURT OR CLERK; COSTS. Any vessel, cargo, or other property in the custody of the marshal ***or other person or organization having the warrant*** may be released forthwith upon the marshal's acceptance and approval of a stipulation, bond, or other security, signed by the party on whose behalf the property is detained or the party's attorney and expressly authorizing such release, if all costs and charges of the court and its officers shall have first been paid. Otherwise no property in the custody of the marshal, ***other person or organization having the warrant,*** or other officer of the court shall be released without an order of the court; but such order may be entered as of course by the clerk, upon the giving of approved security as provided by law and these rules, or upon the dismissal or discontinuance of the action; but the marshal ***or other person or organization having the warrant*** shall not deliver any

property so released until the costs and charges of the officers of the court shall first have been paid.

* * * * *

(9) DISPOSITION OF PROPERTY; SALES



* * * * *

(b) INTERLOCUTORY SALES. If property that has been attached or arrested is perishable, or liable to deterioration, decay, or injury by being detained in custody pending the action, or if the expense of keeping the property is excessive or disproportionate, or if there is unreasonable delay in securing the release of property, the court, on application of any party or of the marshal, ***or other person or organization having the warrant,*** may order the property or any portion thereof to be sold; and the proceeds, or so much thereof as shall be adequate to satisfy any judgment, may be ordered brought into court to abide the event of the action; or the court may, upon motion of the defendant or claimant, order delivery of the property to the defendant or claimant, upon the giving of security in accordance with these rules.

(c) SALES, PROCEEDS. All sales of property shall be made by the marshal or a deputy marshal, or ***by other person or organization having the warrant, or by any***

other ~~proper-officer~~ ***person*** assigned by the court where the marshal ***or other person or organization having the warrant*** is a party in interest; and the proceeds of sale shall be forthwith paid into the registry of the court to be disposed of according to law.



**ADVISORY COMMITTEE NOTE**

These amendments are designed to conform this rule to Fed. R. Civ. P. 4, as amended. They are intended to relieve the Marshals Service of the burden of using its limited personnel and facilities for execution of process in routine circumstances. Doing so may involve a contractual arrangement with a person or organization retained by the government to perform these services, or the use of other government officers and employees, or the special appointment by the court of persons available to perform suitably.